No. 12234

In the United States Court of Appeals for the Ninth Circuit

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLANT

v.

MRS. DOROTHY WARD GINOCCHIO, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

APPELLANT'S BRIEF

ED DUPREE,
General Counsel,
HUGO V. PRUCHA,
Assistant General Counsel,
CECIL H. LICHLITER,
Special Litigation Attorney,
Office of the Housing Expediter, Washington 25, D. C.

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AUTHORITIES CITED

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STATEMENT OF JURISDICTION

This is an appeal by the Housing Expediter from the final judgment of the United States District Court for the District of Nevada, which denied injunctive relief and restitution by the defendant-landlord to a tenant of alleged rental overcharges in an action brought by the Housing Expediter, as plaintiff, to enforce compliance with the Housing and Rent Act of 1947, as amended,[1] (50 U. S. C. App. Secs. 1881 et. seq.), and the Controlled Housing Rent Regulation issued pursuant thereto (12 F. R. 4331).[2] Jurisdiction of the District Court was invoked by Section 206 (b) of the Act (50 U. S. C. App., Sec. 1896 (b)).

[1] Hereinafter referred to as the "Act" or the "Act of 1947."

[2] Hereinafter referred to as the "Regulation" or the "1947 Regulation."

Findings of fact, conclusions of law, and final decree were entered February 10, 1949 (R. 20–22). On March 30, 1949, plaintiff filed notice of appeal (R. 23), and an amended notice on April 8, 1949, the District Court on that same date having entered an order extending the time for appeal (R. 26, 27). Jurisdiction of this Court is invoked under Section 1291 of the Judicial Code (28 U. S. C. 1291).

STATEMENT OF THE CASE

This appeal raises the substantial questions (1) whether the Court below erred in permitting the defendant to contest upon trial findings of fact in the order of an Area Rent Director holding that the housing accommodations here involved did not qualify for decontrol under Section 202 (c) of the Act (*infra,* p. 52), in the absence of defendant's having first exhausted the administrative remedies provided by the Act and Procedural Regulation issued thereunder for review of such order; and (2) whether the Court erred in holding as a conclusion of law that upon the facts of this case, the housing accommodations leased to the tenants herein are additional housing accommodations created subsequent to February 1, 1947. (R. 22.)

Rulings by the trial Court in denying an injunction to restrain the defendant from demanding or receiving for occupancy of the housing accommodations any amounts in excess of the maximum rent established by the Act and Regulation, and in refusing to award restitution to the tenant of rentals admittedly received by the defendant (R. 3, 9), in excess of the

established maximum, stem essentially from the basic determinations by the Court below as stated (R. 22).

STATUTES AND REGULATIONS INVOLVED

By Section 202 (b) of the Act the term "housing accommodations" is defined to mean any "building, structure or part thereof, * * * rented or offered for rent for living or dwelling purposes * * * together with all privileges, services, furnishings, furniture and facilities connected with the use or occupancy of such property" (*infra,* p. 52). Section 202 (c) of the Act defines the term "controlled housing accommodations" as housing accommodations in any defense-rental area except that it does not include, among other excepted structures:

> (3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947; * * * (*infra,* p. 52).

By Section 1 (b) (8) (i) of the Regulation (*infra,* p. 54), there are exempted from control with other exceptions, housing accommodations of the same character as described in Section 202 (c) (3) (A) of the Act above, with the proviso, however,

> That all housing accommodations referred to in this paragraph (8) shall be subject to this regulation unless the landlord files in the area rent office a report of decontrol on a form provided by the Expediter within 30 days after July 1, 1947, or within 30 days after the date of first renting, whichever is the later: and *Provided further,* That if a landlord fails to file

> said report of decontrol within the applicable specified period, such housing accommodations shall be and remain subject to the provisions of this regulation until the date on which he files said report (*infra,* p. 54).

By the same Section 1 (b) (8) of the Regulation it is further provided:

> For the purposes of this paragraph (8) the word "conversion" means (1) a change in a structure from a nonhousing use or (2) a structural change in a residential unit or units involving substantial alterations or remodeling *and resulting in the creation of additional housing accommodations.* [Italics supplied.]

Rent Procedural Regulation 1 (12 F. R. 5916)[3] implements the foregoing sections of the Act and the Rent Regulation. Sections 840.17 through 840.22 thereof provide for appropriate administrative proceedings in the filing by a landlord of *Reports of and Applications for Decontrol,* including entry by the Area Rent Director of an order rejecting such report or application after investigation; Sections 840.23 through 840.24 prescribe the procedure for *Landlord's Application for Review of Rent Director's Action* by the Regional Administrator for the region in which the defense-area office is located; *Subpart B* of the Regulation, Sections 840.25 to 840.45 both inclusive, states the procedure for *Appeals to the Housing Expediter,* in Washington, D. C., for review of an order entered by the Regional Administrator under Sections 840.23–

[3] The pertinent sections of this Regulation including the procedure for appeals there provided are set forth in full in the Appendix (*infra,* p. 55).

840.24, together with the direct review of certain other orders of the Rent Director.

THE FACTS

There is no dispute as to the material facts which may be in substance stated: The housing accommodations involved consist of a single family dwelling of the present numbering 415½ East 8th Street, in Reno, Nevada, owned by the defendant (R. 21, 88). The house was originally constructed for such type of occupancy (R. 79). Prior to the year 1943, the building was altered to create two separate living units as a duplex, of the street numbers 415 and 415½ (R. 76, 79, 89). Between the years 1943 to 1946 the defendant and her family occupied the "rear" unit numbered 415½ (R. 76, 88). During the same period the "front" unit, of the number 415, was rented to a tenant (R. 76, 89). On January 15, 1943, the unit then rented was registered with the Area Rent Office of the Reno Defense-Rental Area as a controlled housing accommodation at the maximum rent of $45.00 per month unfurnished (R. 77). Such registration was under the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. Secs. 901 et seq.),[4] and the Rent Regulation for Housing issued thereunder (10 F. R. 13528).[5] Subsequently the unit was furnished and reregistered at a maximum monthly rental of $57.50 (R. 76–77). On November 8, 1946, upon a decrease of services to the tenant then in occupancy, the maximum rent

[4] Hereinafter referred to as the "1942 Act" or "Act of 1942."

[5] Hereinafter referred to as the "1942 Regulation."

was decreased by order of the Rent Director to $55.50 per month (R. 120).[6] The duplex unit occupied by the defendant and her family was at no time registered as a controlled housing accommodation (R. 83). About December 15, 1946, certain alterations of the duplex structure were commenced and continued until completion about five months later, and subsequent to February 1, 1947 (R. 78, 97). The "net result" of such alterations was that prior to the structural changes "there were two separate and distinct dwelling units," and after the work had been completed "there was one dwelling unit" (R. 79). The single dwelling after such changes was known as 415½ East 8th Street (R. 89), and bears such street number today (R. 93).

The 1942 Act expired June 30, 1947. The effective date of the Housing and Rent Act of 1947 and the Controlled Housing Rent Regulation issued thereunder was July 1, 1947. Section 204 (b) of the Act of 1947 provides substantially that from the effective date thereof no person should demand or receive any rent for the use or occupancy of controlled housing accommodations greater than the maximum rent established under the Act of 1942, and in effect

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[6] Such order was entered pursuant to Section 5 (c) of the 1942 Regulation which in part provides (10 F. R. p. 13532): "(c) *Grounds for decrease of maximum rent.* The Administrator at any time on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable only on the grounds that; * * *

"(3) *Decrease in services, furniture, furnishings or equipment.* There has been a decrease in the minimum services, furniture, furnishings or equipment required by Section 3 since the date or order determining the maximum rent."

on June 30, 1947 (*infra,* p. 52). On such date the only lawful rent with respect to any part of the remodeled dwelling was the monthly rental of $55.50, as established by the order of the Area Rent Director, for the one unit of the street numbering 415, when the structure was in the form of a duplex (R. 77, 83, 89, 120).[7]

On July 30, 1947, by instrument in writing of the same date, the defendant leased the entire house, together with certain furniture therein, to the tenants, Matthew S. Weiser and his wife for a period of two years from August 1, 1947. The monthly rental therein provided was $250.00 per month (R. 89, 94, Defendant's Exhibit "K," R. 110). Such lease was executed before the defendant had filed the report of decontrol as required by Section 1 (b) (8) of the Rent Regulation (*supra,* p. 3), (R. 78). The lease recited that rental for the first month of August, 1947, and for the last five months from March 1, 1949, to July 31, 1949, in the total amount of $1,500.00 had been paid in advance, the receipt of which was acknowledged by the defendant (R. 111). On July 30, 1947, when the lease was executed the only registered maximum rent covering any part of the dwelling was the rental of $55.50 per month for the former single unit of the duplex (R. 77).

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[7] Section 4 (a) of the 1947 Regulation provides in effect that the maximum rent of any housing accommodation shall be the maximum rent which was in effect on June 30, 1947, as established under the 1942 Act and the 1942 Regulation (*infra*, p. 55).

On August 13, 1947, there was a telephone conversation between the Area Rent Director, Charles Wemken, and the defendant (R. 72, 109). The details of such conversation are not disclosed by the record but thereafter, and on the same date, Mr. Wemken advised the defendant by letter of having discussed "your case" by phone with a regional rent attorney of the Housing Expediter's office in San Francisco, who had sustained the Director's opinion that the altered single dwelling unit "is not eligible for decontrol" (R. 109). The letter further advised of the regional attorney's view that the proper procedure to establish rental "for the house as it now exists" was a petition "for an adjustment in rent."[8] Procedure in this respect was explained and forms of petition for such adjustment were enclosed (R. 109–110). The defendant, however, made no such application (R. 77).

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[8] Section 5 (a) of the 1947 Regulation provides among other *Grounds for increase of maximum rent* upon the filing by a landlord of a petition for adjustment (12 F. R. p. 4334): "(1) *Major capital improvement after effective date.* There has been on or after the effective date of the Rent Regulation for Housing, issued pursuant to the Emergency Price Control Act of 1942, as amended, a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement, and maintenance or a substantial increase in the services, furniture, furnishings, or equipment, and the rent on the maximum rent date was fixed by a lease or other rental agreement which was in force at the time of such change or increase. * * *

"(3) *Substantial increase in space, services, furniture, furnishing or equipment.* There has been a substantial increase in the services, furniture, furnishings, or equipment provided with the housing accommodations since the date or order determining its maximum rent or a substantial increase in the living space since June 30, 1947. * * *"

After the middle of August, 1947, defendant filed with the Area Office of the Reno Defense-Rental Area the form provided by Section 1 (b) (8) of the Rent Regulation (*supra,* p. 3), for decontrol of the leased dwelling (R. 78). After making an investigation of the housing accommodations (R. 78), as provided by Section 840.18 of Rent Procedural Regulation 1 the Rent Director on September 9, 1947, issued an order (R. 12, 115), as provided by Section 840.19 of the same Regulation (*infra,* p. 56). Such order rejected decontrol of the housing accommodations upon the ground, among others, that the unit as altered from the former duplex "is not a conversion completed on or after February 1, 1947" (R. 115–116).[9] Upon receipt of such order the defendant made no request for reconsideration thereof by the Director as provided by Section 840.20 of the Procedural Regulation. At the same time the defendant filed no application for review by the Regional Administrator as provided in the same section and in Section 840.23 (*infra,* p. 57).

By letter of September 17, 1947 (R. 119), to the Area Director, defendant's attorney, Charles L. Richards, advised of his desire to file "further objections" to the Director's order, but "would rather delay taking the matter up with the Regional Office at San Francisco, Calif.," until he had first had an opportunity of presenting "the facts as we see them"

[9] This order was based upon a "physical inspection of the premises" by the Rent Director after receipt of the application for decontrol (R. 78).

to the rent advisory board provided[10] by Section 204 (e) (1) of the 1947 Act (*infra,* p. 53). The same letter stated the attorney's understanding that "such a Board shall act only in an 'advisory' capacity," but that he desired to have the privilege of presenting the matter for "their determination" (R. 119). Correspondence between the Rent Director and defendant's attorney followed, Mr. Richards being advised of the board's organization not being completed when his letter of September 17th was received, but being finally accomplished on October 27, 1947, with advice also of subsequent meetings (R. 42, 43, 44). After consideration of the facts, the rent advisory board by letter of November 25, 1947, addressed to the defendant and her husband, advised of its "recommendation" as follows (R. 121):

> Owing to the nature and type of alterations and since only 240 sq. ft. of floor space have been added, and no contribution made for the provision of additional families; and in view of the many vacancies now existing for single rooms; and in consideration of the primary intent of the law governing controls of rentals, the property must remain under its original controlled status.

The same letter also states that "Our Board feels that you are entitled to apply to the Area Rent Control Office for an adjustment of rent * * *" (R. 121–122). The defendant having made no appli-

[10] While the letter referred to "the Board of Control that has been appointed by Governor Pittman, covering this area," it is obvious from further proceedings that reference to the rent advisory board provided by the Act was intended.

cation for a rent adjustment, the Area Director on December 12, 1947, pursuant to Section 5 (a) of the 1947 Regulation, issued an order adjusting the maximum rent of the housing accommodations, effective from August 1, 1947 (R. 118). It was from such date that defendant had leased the altered single unit at a rental of $250.00 per month (R. 111). By such order, the maximum rent of $55.50 per month covering the one former duplex unit (R. 120), was changed to $180.00 per month for the dwelling unit existing after the alterations (R. 118).[11]

The first communication of defendant's attorney, Mr. Richards, with the Regional Administrator, Ward Cox, in San Francisco, was by letter dated December 20, 1947 (R. 44, 73). Such letter was written at the request of the defendant following her phone conversation with Mr. Cox, the date of which does not appear, but in which conversation Mr. Richards' letter recites that the Regional Director had requested a copy of "my Complaint together with 'points' and 'citations' presented to the Office of Rent Control in Reno" (R. 45). The same letter enclosed "copy requested" (R. 45).

On January 2, 1948, the Regional Administrator replied to Mr. Richards' communication (R. 39–40). In such response Mr. Cox noted that the "complaint" enclosed "was addressed to the Reno Rent Advisory Board," and did not state sufficient facts to determine

[11] Such increase was based upon the grounds stated in Section 5 (a) (1) and Section 5 (a) (3) of the Regulation by reason of a major capital improvement of the housing accommodations and a substantial increase in space, services, furniture, or equipment provided (*supra*, p. 8).

whether the action of the Area Rent Office was correct; that the Administrator was writing the Area Office for a report and as soon as a reply was received defendant's attorney would be advised further (R. 40). The same letter advised of the procedure prescribed in Rent Procedural Regulation 1 (*infra,* p. 55), for review of the decision of the Rent Director, a copy of this Regulation being attached. Attention was particularly invited to Section 840.23 providing for filing of application for review by the Regional Administrator, and of Section 840.25 setting forth the procedure for filing an appeal with the Office of the Housing Expediter in Washington, D. C. (R. 40). In response to such letter no further proceeding was filed by the defendant with the Regional Administrator and no appeal was filed with the Washington Office of the Housing Expediter (R. 40). On February 10, 1948, Mr. Cox advised Mr. Richards in further reference to his earlier letter of January 2, 1948, and stated that upon investigation it was found that the proceedings in the Area Rent Office were handled in accordance with the Rent Regulations and interpretation thereof by the Regional Rent Attorney; also, that as a suit had been filed, "decision in this case rests with the court" (R. 44).

PROCEEDINGS IN THE COURT BELOW

The complaint filed by the Housing Expediter January 24, 1948 (R. 2) under Section 206 (b) of the 1947 Act (*infra,* p. 53), alleged that the housing accommodations consisting of the altered dwelling were at all times since July 1, 1947, subject to the Act

and Rent Regulation issued thereunder (R. 2); that on December 12, 1947, the Rent Director for the Defense-Rental Area wherein the accommodations are situated had issued the order reducing the maximum rent effective from August 1, 1947, and directing the defendant to refund within thirty days after issuance any rent received in excess of the lawful maximum as thus fixed; that the amount of rent demanded and received by defendant between August 1, 1947, and December 12, 1947, in excess of the maximum as fixed by such order was $1,100.00; that the defendant had violated the Regulation by failing and refusing to refund to the tenant any part of such amount as the order required (R. 3).

The complaint prayed a temporary injunction enjoining the defendant from demanding or receiving rents in excess of the lawful maximum, and that an order issue directing refund to the tenant, Weiser, the sum of $1,100.00 in excess of the lawful rental established (R. 3–4). Schedule attached to the complaint as Exhibit "A", showed rent collected of $250.00 per month over and above the legal maximum of $180.00 per month for five months from August 1, 1947, to December 31, 1947, resulting in an overcharge to the tenant of $70.00 per month, or a total of $350.00 (R. 4). The same schedule set forth that defendant also received and retained the sum of $750.00 from the tenant as a bonus, security deposit or prepayment of rent in violation of the Rent Regulations, making the total amount refundable to the tenant $1,100.00 (R. 4).

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The answer of defendant admitted entry of the reduction order requiring refund of rent as the complaint alleged, the receipt of the sum of $1,100.00 as stated in the complaint and the refusal to refund the same (R. 9). Defendant alleged that her refusal to make such refund was due to the fact that she believed "the Rent Expediter of the Reno rent area" had exceeded his authority under the 1947 Act in making such order, upon the claim of defendant that the housing accommodations were decontrolled and beyond the jurisdiction of the Expediter (R. 9).

In response to plaintiff's request for admission (R. 10), defendant admitted that during the period from August 1, 1947, to December 31, 1947, the maximum rent for the accommodations formerly described as the duplex units of the numbering 415 and 415½ East Eighth Street in Reno, was $180.00 per month as fixed by the order of the Rent Director effective from August 1, 1947 (R. 11); also, that over the stated period defendant had received rent for August, September and October at $250.00 per month, carrying the excessive amount of $70.00 per month or a total of $210.00 over the three-months' period (R. 15). Order upon pretrial conference (R. 17–18) recites the defendant's admission of receipt of $750.00 from August 1, 1947, to December 31, 1947, and the receipt also of the sum of $1,100.00 between August 1, and December 12, 1947, in excess of the lawful maximum rent. Four checks of various dates between July 19, and September 23, 1947, all signed by the tenant, Matthew S. Weiser, and totaling $2,000.00 were received in evidence as plaintiff's Exhibit 1, at

the Pretrial Conference (R. 18, 116). Upon trial, the receipt by defendant of $2,000.00 in rental payments was admitted (R. 33).

At the conclusion of trial on January 19, 1949, the Court below held that the defendant had not failed to "follow the administrative procedures" (R. 70), in seeking review of the order of the Rent Director (R. 12, 115), rejecting decontrol of the housing accommodations. The trial Court further held (R. 108), after considering the nature of the alterations whereby the duplex units were converted into a single dwelling, that after February 1, 1947, additional housing accommodations were created by conversion of the premises, and the relief prayed for permanent injunction and refund to the tenant of the sum of $1,100.00 was denied (R. 108). On January 20, 1949, judgment was entered in accordance with such findings (R. 19). By conclusions of law and decree entered February 10, 1949, it was adjudged that the dwelling unit in question was not at any time subsequent to August 1, 1947, controlled housing accommodations under the Act of 1947; that plaintiff's application for a permanent injunction be denied, together with the application for an order requiring restitution to the tenant of the amount of $1,100.00 (R. 22, 23). From such judgment and decree the present appeal has been taken (R. 27).

SPECIFICATIONS OF ERROR

1. The Court below erred in permitting the defendant to contest at trial findings of fact in the order of the Area Rent Director that the housing accommodations did not qualify for decontrol, in the absence

of defendant having first exhausted the administrative remedies provided by the Act and Procedural Regulation for review of such order.

2. The Court below erred in holding as a conclusion of law that the defendant did not fail to pursue the administrative remedies available to her prior to commencement of this action.

3. The Court below erred in holding as a conclusion of law and in the final decree, that the dwelling leased by the defendant after alterations of the duplex structure did not constitute controlled housing accommodations.

4. The Court below erred in denying an injunction as the complaint prayed, restraining the defendant from further rent overcharges in violation of the Act and Regulation.

5. The Court below erred in failing to enter an order requiring the defendant to refund to the tenant, Matthew S. Weiser, amounts received in excess of the lawful maximum rental.

6. The Court below erred in failing to grant judgment in favor of plaintiff and against the defendant.

ARGUMENT

I

The Court below erred in permitting the defendant to contest at trial findings of fact in the order of the Area Rent Director that the housing accommodations did not qualify for decontrol, in the absence of defendant having first exhausted the administrative remedies provided by the Act and Procedural Regulation for review of such order

The defendant both in her answer and upon trial admitted receipt of the amount of $1,100.00 which the

complaint alleged was received in excess of the lawful maximum rental (R. 3, 9, 33). However, at the commencement of trial defense counsel stated as "the contention of the defendant," that "the Housing Expediter exceeded his authority and jurisdiction and went beyond the scope of his power in determining a rent ceiling for this particular property" (R. 33). In response to such contention counsel for plaintiff stated (R. 36):

> The rent regulation, procedure regulation, provides upon rejection of application for order of decontrol that the owner then has the right to appeal to the regional administrator. It further provides for direct protest to the national administrator. In the instant case none of those remedies have been sought. It is our position, as a matter of law, in order to be permitted to raise those questions in this court, while this court ultimately would have the jurisdiction to consider those matters, I think the rule is well settled that a person has first to exhaust his administrative remedies.

It is submitted that the rule referred to should have been applied, and that it was clearly error for the lower Court to permit the validity of the order rejecting decontrol to be contested (R. 68, 70).

As this Court held in *La Verne Co-op Citrus Assn.* v. *United States,* 143 F. 2d 415, "The principle that administrative remedies must be exhausted before one may resort to equity is well established." See too, *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41; *Yakus* v. *United States,* 321 U. S. 414; *Macauley* v. *Waterman Steamship Corp.,* 327 U. S.

540, 544; *Aircraft Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752; *Gates* v. *Woods,* 169 F. 2d 440 (C. A. 4th); *Koster* v. *Turchi,* 173 F. 2d 605, 608 (C. A. 3d). Applying the same rule to administrative orders entered pursuant to Rent Regulations under the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947 are the recent decisions of this Court not yet reported of *Woods* v. *Kaye,* No. 12029, decided June 22, and *Babcock* v. *Koepke,* No. 12118, decided June 24, 1949. See, too, *Smith* v. *Duldner* (C. A. 6th), No. 10825, decided July 5, 1949, not yet reported; *Woods* v. *Durr* (C. A. 3rd), No. 9811, decided June 29, 1949, not yet reported.

In *Woods* v. *Kaye, supra,* the Area Rent Director issued an order pursuant to Section 4 (e) of the 1942 Regulation decreasing the rent of a housing accommodation from the first rental of $150.00 per month. The landlord having failed to register the accommodation within the time required by Section 3 of the same Regulation the order was made retroactive from the date when the house was first rented, and the excess rent collected was ordered refunded to the tenant. In an action by the Housing Expediter under Section 205 (a) of the 1942 Act, to compel restitution the defendant challenged the retroactive aspect of the order and the trial Court found the order to be invalid. In reversing such judgment this Court said (pp. 4–5, Slip Opinion):

> The administrative findings of fact underlying the retroactivity of the order are to be viewed in no different light than those upon

> which the maximum rent figure of $75 per month was based, and we cannot conceive of the sufficiency of those facts being tested in the District Court. It would thus seem clear, in this situation, that the District Court is bound by these findings. The failure of the landlord to properly follow the procedure of review provided, results in a bar to contesting the enforcement action in the District Court.

While the review procedure considered in the *Kaye* case involved the sole jurisdiction of the Emergency Court of Appeals to review the order there involved, in *Babcock* v. *Koepke, supra,* this Court applied the rule requiring exhaustion of administrative remedies to the procedure for review of orders of an Area Rent Director as provided by Revised Rent Procedural Regulation 1 issued by the Housing Expediter pursuant to Section 204 (d) of the 1947 Act.[12] In the cited decision an action was sought to be maintained by plaintiff against Koepke, Individually and as Rent Director of the Los Angeles Defense-Rental Area, seeking a declaratory judgment that certain premises owned by plaintiff were not subject to control under the 1947 Act. The complaint sought a preliminary injunction to restrain the defendant from issuing a threatened order to fix rents

[12] Revised Rent Procedural Regulation 1, effective May 1, 1948 (13 F. R. 2369), is a revision of Rent Procedural Regulation 1 (*supra*, p. 4), which was in effect on September 9, 1947, when the order rejecting decontrol of the housing accommodations in the case at bar was entered (R. 12–13, 115). Section 840.11 of the Revised Regulation referred to in the *Koepke* decision contains substantially the same provisions as Section 840.23 of the Regulation before revision which section is there entitled *Landlord's Application for Review of Rent Director's Action* (*infra*, p. 57).

in an amount considerably less than plaintiff's leases of the accommodations provided should be paid and requiring refund of excess rents collected. In reviewing a judgment dismissing the complaint this Court said (p. 2, Slip Opinion):

> The parties are agreed that there is a justiciable issue between them as to whether the premises are in the appellee's control under the 1947 act. That act provides a method of adjudicating the issue in the administrative procedure of the rent control agency. The court's dismissal of the complaint for a declaratory judgement was on the ground that appellant had not exhausted this administrative remedy.

After considering the applicable sections of the Regulation and the reason advanced by plaintiff for not following the administrative procedure there provided, the Court went on to say (Slip Opinion pp. 3–4):

> We think, however, that appellant could have presented his contention of noncontrol under the Section cited *supra,* [840.11] and that he failed to exhaust his administrative remedy by not so acting. If he there had prevailed, there would be no occasion to invoke the challenged provisions of 840.11.
>
> We agree that the district court properly dismissed the complaint, and affirm the judgment.

In *Smith* v. *Duldner, supra,* an action was sought to be maintained against the defendant, Rent Director, to enjoin enforcement of an order reducing rents on certain rooming house living units. The

action was dismissed on the ground, among others, that under Rent Procedural Regulation 1, plaintiff was entitled to review of and appeal from such order which remedy at law must be presumed to be adequate. In affirming judgment of dismissal the Court said:

> Furthermore, in Rent Procedural Regulation No. 1, an orderly procedure is prescribed for the Rent Control authority in making the various kinds of determination in connection with the establishment of maximum rents. For a landlord aggrieved by a determination there is provided the right of administrative appeal from the Rent Director to the Regional Rent Administrator and from him to the Housing Expediter. Appellant never attempted to avail herself of these administrative remedies.

In considering plaintiff's contention that the procedure provided by the Act and Regulation does not satisfy the requirements of due process and are thus invalid and unconstitutional the Court further stated:

> The regulation, in carrying out the objectives of the Act, is designed for the purpose of affording appellant a plain, adequate, and complete remedy at law for the rights she relies upon. Until she has availed herself of these administrative remedies and been deprived of rights guaranteed her under the constitution, it can not be said she has been denied due process. Since appellant did not exhaust her administrative remedies, her petition for an injunction was properly denied, and her complaint dismissed.

In *La Verne Co-op Citrus Assn.* v. *United States, supra,* this Court determined that the rule as to exhaustion of administrative remedies applies equally where the validity of an administrative order is challenged by way of defense to its enforcement as well as in cases where invalidity of the order is sought by affirmative relief. As the Court there said (143 F. 2d pp. 419, 420):

> A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action. * * *
>
> The question then arises whether the administrative remedy rule applies where the one harmed by the administrative order is the defending party in the equity action. The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the issue is raised by defending parties as where it is raised by moving parties. A consideration of the defense in an enforcement action would nullify the uniformity achieved by devising a single procedure for testing orders promulgated in accordance with the terms of the Act.

To the same effect as the cited decision are *Yakus* v. *United States, supra,* 321 U. S. pp. 434, 435 and *United States* v. *Ruzicka,* 329 U. S. 287, pp. 293–294.

It is therefore respectfully submitted that the Court below clearly erred in permitting the defendant

to challenge the validity of the administrative order in the present proceeding.

1. The procedure followed by defendant was not in compliance with the provisions of Procedural Regulation 1, and there was no basis for the lower Court to hold that the defendant did not fail to pursue the administrative remedies available for review of the order denying decontrol of the remodeled dwelling

As earlier pointed out (*supra,* p. 4), the above Procedural Regulation in implementing Section 202 (c) (3) of the Act sets forth a clearly defined procedure for review of the order which the defendant challenged (R. 12, 115).[13] Such order was issued September 9, 1947 (R. 71). By letter of the same date the Rent Director advised defendant's attorney, Charles L. Richards, to such effect (R. 119). The defendant, however, made no effort to follow the review procedure provided in Section 840.23 of the Regulation by appeal to the Regional Rent Administrator (R. 36, 37, *infra,* p. 57). On the contrary de-

[13] In *Gates* v. *Woods*, *supra*, the Court of Appeals for the Fourth Circuit referred to the procedural regulation here involved and the requirement of exhausting administrative remedies in the language (169 F. 2d pp. 442, 443):

"Furthermore, in Rent Procedural Regulation 1 (12 F. R. 916, 5923) an orderly, simple and efficient procedure is prescribed for the Office of Rent Control, Office of the Housing Expediter, in making the various kinds of determinations in connection with establishment of maximum rents. For a landlord aggrieved by a determination there is provided the right of administrative appeal from the Rent Director to the Regional Rent Administrator and from there to the Housing Expediter. §§ 840.08, 840.23–840.45 of Rent Procedural Regulation 1. * * *

"The rule as to the exhaustion of administrative remedies applies just as forcibly when, as here, the contention is made that the administrative agency lacked jurisdiction over the subject-matter. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, 58 S. Ct. 459, 82 L. Ed. 638, and cases there cited."

fendant by her attorney elected to present the matter to the rent advisory board of the Area Rent Office (R. 37, 119).

The defendant in such procedure was in no way "misled" by any representative of the Office of the Housing Expediter or "encouraged" in "the submission of this question to the local advisory board," as expressions of the trial Court inferred (R. 48, 50). On the other hand, the procedure thus followed was deliberately adopted by defendant's attorney. This fact is established by Mr. Richards' letter of September 17, 1947 (R. 119), in response to the Rent Director's advice that the order rejecting decontrol had been entered (R. 71). As appears from such letter, defendant's attorney was not only aware of the administrative procedure for "taking the matter up with the Regional Office," but also that he preferred to "delay" such action until "the facts as we see them" had been presented to the board appointed by the Governor (R. 119). From the same letter it is equally clear that Mr. Richards was familiar with Section 204 (e) (1) of the Act which provided in effect for such board to "act only in an 'advisory' capacity." Under such Section 204 (e) (1), the "local advisory board" which the Housing Expediter was authorized to create by nomination of members for appointment by State Governors, was empowered only to make "recommendations" to officials administering the Act within local areas "in individual adjustment cases," and to make "recommendations" to the Expediter only with respect to definitely prescribed matters (*infra,* p. 53). The board was in-

vested with no review or appeal jurisdiction. It follows that defendant's election of first "presenting the facts" to such board with respect to the order of the Rent Director in question was in no respect a compliance with the procedure for review provided by the Regulation (*infra*, p. 55).

Nor was there any supporting basis in defendant's further procedure for the trial Court to "assume" that "they [the defendant] might be somewhat excused for failure to follow this regulation that would require appeal to the regional rent director and then from there to the expediter" (R. 50), or for the further expression of the Court that "It is evident that the office of housing expediter or regional director or someone cooperated with the defendant in getting this matter before the local advisory board" (R. 51). In the same connection the Court below remarked at trial that "It could be" that by such "cooperation of the office of housing expediter or any of his subordinates," the defendant "could have overlooked or could have been blinded" as to "these regulations or procedures" governing the administrative review process (R. 51). The facts are directly to the contrary. Moreover, by publication of Procedural Regulation 1 in the Federal Register (12 F. R. 5916), the defendant and her attorney were charged with notice of the procedure for review and appeal there provided[14] cf. *Flannagan* v. *United*

[14] Title 44 U. S. C. § 307 among other recitals provides in effect that the filing of any document for Federal Register publication "shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby."

States, 145 F. 2d 740, 741 (C. A. 9th), *Hagen* v. *Porter,* 156 F. 2d 362 (C. A. 9th). And as appears from his letter of September 17, 1947 to the Rent Director, defendant's attorney had actual knowledge of such procedure (R. 119).

The defendant's attorney elected to first proceed with the local advisory board without suggestion or advice by the Rent Director or any other officer of the Housing Expediter. Not only was such procedure by deliberate choice, but her attorney purposely chose to "delay taking the matter up with the Regional Office at San Francisco," until the matter had been presented to the local board (R. 119). Due to the refusal of certain appointed members to serve, the board organization was not completed until October 21, 1947 (R. 43). Of such fact the Area Director advised defendant's attorney on the following day, with a subsequent letter of November 10th advising of the next board meeting on November 13th (R. 43–44). In such correspondence the Rent Director was complying only with the request of defendant's attorney for "definite information" when organization of the board "will be completed and ready for action" (R. 119). In the Director's letter of November 10, 1947, it was stated that Mr. Richards and his client, Mrs. Ginocchio, "may be present," at the board meeting there referred to, "to present such facts as you deem pertinent in this case" (R. 44). The defendant though testifying at the trial (R. 88), did not state whether she or her attorney attended any board meeting at which her "complaint" was considered (R. 43).

On November 25, 1947, the advisory board by its chairman, addressed a letter to the defendant and her husband, with a copy to her attorney, which advised of the board's "recommendation" that the premises as altered from the former duplex structure "must remain under its original control status" (R. 121). The same letter advised of the board's view that the defendant was entitled to apply to the Area Rent Office "for an adjustment of rent" (R. 122). The defendant, however, made no application for such adjustment, thus declining to avail herself of a further administrative remedy provided by the Act and Rent Regulation.[15] As previously pointed out (*supra,* p. 8), the Rent Director as early as August 13, 1947, had advised defendant of the procedure to be followed in applying for such adjustment but no application for rent increase was filed (R. 109).

Following advice of the board's "recommendation" there was no further communications between the defendant and her attorney and the Area Rent Office. The course taken by the defendant was of substantially the same character as recognized by this Court in *Woods* v. *Kaye, supra,* quoting from the concurring opinion of Mr. Justice Rutledge in *Bowles* v. *Willingham,* 321 U. S. 503, p. 527:

> Accordingly, by declining to take the plain way opened to her, more inconvenient though that may have been, and taking her misconceived remedy by another route, she has arrived

[15] The material portions of Section 5 (a) of the Rent Regulation providing for increase of maximum rent upon "the filing by a landlord of a petition for adjustment," appear in footnote, *supra,* p. 8.

where she might well have expected, at the wrong end.

2. Under any view of the facts there was no basis to hold that the defendant had exhausted the administrative remedies provided by the Act and Procedural Regulation

Considering the procedure followed by defendant, the Court below upon trial stated, "I am going to hold that administrative remedies have been exhausted" (R. 68), and in overruling the objection of plaintiff to the defendant contesting the findings of the Rent Director's order the Court further remarked (R. 70):

> * * * so I am going to hold now that the defendants in this case have not failed to follow the administrative procedures.

It is submitted that such ruling was clearly erroneous. Not only did the defendant fail to follow the prescribed administrative review in the procedure adopted by her attorney before the rent advisory board, but after communicating with the Regional Administrator, she failed to exhaust the administrative remedies which continued available. The defendant made no attempt to file an appeal with the Office of the Housing Expediter in Washington, D. C., as Section 840.25 of the Procedural Regulation expressly provided (*infra,* p. 59).

Section 840.23 (b) of the Regulation prescribes a period of sixty days from the date of issuance in which to file an application for review of a Rent Director's order, or dismissal of the application if not filed within such period unless special circumstances are shown to justify a later filing (*infra,* p. 58). Sixty days from September 9, 1947, on which date the order

rejecting decontrol was entered (R. 115) expired November 8, 1947. Over such period defendant filed no application for review. Nor did the defendant make any application for an extension of the review period.

The rent advisory board was invested with no authority to enter an order determining control of the housing accommodations. Procedural Regulation 1 contained no provision for appeal from any action by the board, and there existed no basis for review of the board's recommendation communicated to the defendant November 25, 1947, that "the property must remain under its original controlled status" (R. 121). Thus the defendant allowed the period for review as prescribed by the Regulation to completely expire without availing herself of the administrative remedies there provided. Over the entire sixty days from September 9, 1947, the "delay" of her attorney (R. 40), "in taking the matter up with the Regional Office in San Francisco," continued. It follows that her attorney's letter of December 20, 1947, addressed to the Regional Administrator and enclosing copy of "Complaint" (R. 44) presented to the advisory board, did not constitute compliance with the Procedural Regulation.

The Court below, however, proceeded upon the view that "the time for application of administrative remedies" should be considered "beginning * * * as November 25, 1947, the date of the board's recommendation" (R. 121). The trial Court further expressed the view that it would "be only fair * * * to

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consider that the defendant had appealed to the regional director" (R. 53), by her attorney's communication of December 20, 1947, to Ward Cox, the Regional Administrator. Such letter in part reads (R. 44–45):

> I am writing you on behalf of my client, Mrs. Ginocchio, re the above subject matter. She has requested that I do so as a result of a conversation between you over the phone, wherein you requested a copy of my Complaint together with "points" and "citations" presented to the Office of Rent Control in Reno.

The defendant upon testifying at trial (R. 88) was not questioned concerning her conversation with Mr. Cox (R. 53) to which the above letter refers, and the nature of such conversation is not disclosed.

On January 2, 1948, the Regional Administrator replied to the foregoing letter (R. 39–40). Such response noted that the "complaint" enclosed "was addressed to the Reno Rent Advisory Board," and further advised (R. 40):

> We do not find sufficient facts stated in the complaint to be able to determine whether or not the action of the area rent office was correct. We are writing to the area office today for a report and as soon as we receive their reply we will communicate with you further.
>
> For your information, Rent Procedural Regulation 1 sets forth the procedure for filing appeal from decision of the area rent director. We attach a copy hereto and call your attention to Section 840.23 providing for filing of an Application for Review to be conducted by the Regional Rent Administrator. Form D9

> for that purpose may be obtained in the area rent office.
>
> Subpart B, Section 840.25, sets forth the procedure for filing an appeal with our Washington office.

Thus defendant's attorney was definitely advised of the procedure to be followed in applying for review by the Regional Administrator. However, under the procedure definitely set forth, the defendant made no attempt to appeal either to the Regional Administrator or to the Housing Expediter (R. 40). Thereafter there was no further communications from the defendant or her attorney to the Regional Administrator. In a letter dated February 10, 1948, the Administrator advised her attorney as follows (R. 44):

> This is in further reference to our letter to you dated January 2, 1948.
>
> Upon investigation, we find that the proceedings in the area rent office were handled in accordance with the Rent Regulations and an interpretation of the regulation by the Regional Attorney.
>
> As suit has now been filed, decision in this case rests with the court.

Based upon the foregoing correspondence the trial Court in effect held that "the regional director made a decision in this case on February 10, 1948," and as the Court further stated, "it doesn't make any difference whether he handed it to him through the back door or the front door, he handed them a decision" (R. 70).

The review period from the order of September 9, 1947, having expired under the Regulation there was

> Their failure to do so cannot be used to support their argument that due process has been denied them, particularly since they have not shown inadequacy with respect to the available administrative relief. *Yakus* v. *United States,* 64 S. Ct. 660; *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, 310, 58 S. Ct. 199, 82 L. Ed. 276.

Also, in *Yakus* v. *United States, supra,* the Supreme Court gave effect to the same principle in the language (321 U. S. p. 434):

> In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by "loading the record against them" or denying such hearing as the Constitution prescribes.

It may be contended from a statement in the Administrator's letter of February 10th that as a suit had been filed, "decision in this case rests with the court" (R. 44), that the defendant was led to believe she had no further administrative remedies to exhaust or that it was unnecessary to exhaust such remedies. It is submitted that the letter supports no such assumption and the defendant though testifying upon trial (R. 88), made no claim that she or her attorney had been misled by any representative of the Office of the Housing Expediter in adopting the procedure which was followed.

Giving full effect, however, to the suggested contention, the same furnishes no basis to sustain the

lower Court's ruling. After holding that defendant had not failed "to follow the administrative procedures" and hearing testimony (R. 70), the trial Court predicated judgment on the erroneous theory that by alteration of the duplex structure to a single living unit "additional housing accommodations were created," so that the entire remodeled house was decontrolled under the Act and Regulation (R. 108). Taking the view most favorable to the defendant there was no basis for entering such judgment. The course which the trial Court might properly have followed would have been to stay the present enforcement proceeding to afford defendant opportunity to exhaust the administrative remedies which she may have believed were unnecessary to pursue because of the afore-mentioned letter. It follows that the Court below erred in holding that administrative remedies had been "exhausted" and in entering judgment as described.

II

The Court below erred in holding that the single dwelling unit resulting from alteration of the duplex structure did not constitute controlled housing accommodations

In holding at the conclusion of trial, that "on or after February 1, 1947, additional housing accommodations were created by conversion of these premises," and that such premises were "decontrolled" under the Act of 1947 (R. 108), the Court below stated no reasons as the basis for such ruling. Nor does the record disclose any supporting basis. The trial Court appeared to have disregarded the fact that the entire structure, and not the separate

rooms therein existing after the alterations, constituted the housing accommodations involved; also, that in the former duplex there were two complete living units, while after the alterations there was only one dwelling unit (R. 79). It was the single dwelling as thus altered that the defendant leased on July 30, 1947, at the rental of $250.00 per month (R. 44, 110). It was for such living unit that defendant filed application for decontrol and to which the order rejecting decontrol applied (R. 78, 82, 115). Upon these facts the trial Court's determination (R. 108), "that these premises are decontrolled under the housing act of 1947," was clearly erroneous.

1. Under the official interpretation of the Housing Expediter the altered living unit did not constitute "additional housing accommodations created by conversion," subsequent to February 1, 1947

On August 25, 1948, the Housing Expediter issued an official interpretation of Section 202 (c) (3) of the Housing and Rent Act of 1947, as amended, and of Section 1 (b) of the 1947 Regulation, as amended [16] which in the material portions thereof provides (13 F. R. 5001, 5002): [17]

> The following is an interpretation of those provisions of the Rent Regulations and of the

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[16] By amendment effective April 1, 1948 (13 F. R. 1861), the Controlled Housing Rent Regulation was amended, but by such amendment there remained unchanged the exemption formerly stated in Section 1 (b) (8) (i) of the Regulation (*supra*, p. 3), of "additional housing accommodations created by conversion on or after February 1, 1947."

[17] The Federal Register Act, 44 U. S. C. A. Section 307, provides that the Federal Register "shall be judicially noticed * * *". cf. *Flannagan* v. *United States*, 145 F. 2d 740, 741 (C. A. 9th), (*supra*, p. 25), and *Hagen* v. *Porter*, 156 F. 2d 362 (C. A. 9th).

Housing and Rent Act of 1947, as amended, which provide for decontrol of the classes of housing accommodations listed below: * * * The classes of housing accommodations covered by this interpretation are the following:

* * * * *

V. Additional housing accommodations created by conversion on or after February 1, 1947.

* * * * *

5. *Requirement that additional housing accommodations result from the alterations or remodeling.* Where there has been a structural change involving substantial alteration or remodeling, decontrol occurs only if additional housing accommodations result from this work. This determination is made with respect to the dwelling involved in the creation of additional housing accommodations. * * *

6. *Basis for determining whether additional housing accommodations have been created.* In determining whether additional housing accommodations have been created, the primary test is not whether there are more tenants in occupancy than before the conversion, nor whether there is more floor space. The determination is made by comparing the number of dwelling units before and after the conversion. * * *

It is true that the structural changes here considered did involve substantial alterations of the duplex arrangement. As a result of these substantial alterations, appellee could have applied for an adjustment in rent (cf. *Woods* v. *Olinger,* 170 F. 2d 895

(C. A. 5th); *Dodge* v. *Woods,* 170 F. 2d 761 (C. A. 1st); *Elma Realty Co.* v. *Woods,* 169 F. 2d 173 (C. A. 1st). But under the Act, Regulation and foregoing interpretation the resulting single unit was not decontrolled. When Congress used the words "additional housing accommodations," it obviously did not mean merely "additional rooms." The "basis" fixed by the Regulation and interpretation "for determining whether additional housing accommodations have been created" is wholly consistent with the Act. Such "determination" is reached "by comparing the number of dwelling units before and after the conversion," which is the only realistic and common sense view to take. From such comparison where the two dwelling units had formerly existed in the duplex, there remained after the change only the single family dwelling as originally constructed (R. 79, 83, 90). Thus the number of living units was diminished instead of being increased as a "result" of the alterations (R. 79). The interpretation requires, also, that the "determination" whether additional housing accommodations have resulted from the structural changes must be made from the dwelling unit or units "necessarily involved" in the creation of additional accommodations. So, considering in this regard either the duplex units existing prior to the change or the entire structure after alterations had been completed, only one dwelling unit resulted.

The weight to be accorded to administrative interpretations has been clearly stated by this Court. As said in *Bowles* v. *Wheeler*, 152 F. 2d 34 (C. A.

9th), certiorari denied, 326 U. S. 775, with respect to the Price Administrator's interpretation of the Emergency Price Control Act of 1942 (at p. 38):

> His interpretation of the Act and the applicability of the regulations issued under authority of the Act are entitled to great weight and serious consideration.

And in *Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431 (C. A. 9th), certiorari denied, 329 U. S. 720, the Court said in referring to an interpretation of regulations issued under the same Act (at p. 433):

> Since such administrative construction is not irrational, its interpretations are binding upon the courts.

See too (*Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414;[18] *Bowles* v. *Mannie*, 155 F. 2d 129, 133 (C. A. 7th), certiorari denied, 329 U. S. 736; *Porter* v. *Royal Packing Company*, 157 F. 2d 524 (C. A. 8th); *Bowles* v. *Malas*, 81 F. Supp. 485 (D. C. Wis.)).

It follows that under the interpretation considered the single dwelling unit was not "decontrolled" and the Court below clearly erred in so holding (R. 22, 108).

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[18] In *Bowles* v. *Seminole Rock & Sand Co.*, *supra*, the Supreme Court in following the Price Administrator's interpretation of a regulation under the former Emergency Price Control Act said (325 U. S. p. 414):

"The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

2. So far as material to the question of decontrol, the result of the alterations was to create only more floor space in the single living unit, which change did not render the unit exempt from control under the Act and Rent Regulation

In the single dwelling unit which replaced the duplex arrangement 240 square feet of space were added to the floor plan of the one story structure (R. 90, 95, 121). But as stated in the official interpretation, the "primary test" in "determining whether additional housing accommodations have been created, * * * is not whether there are more tenants in occupancy than before the conversion, nor whether there is more floor space" (*supra,* p. 37). The determination respecting decontrol being made only by "comparing the number of dwelling units before and after the conversion," it follows that the creation of such additional space furnished no basis for decontrol of the single dwelling. That the addition of such space was the only result of the alterations so far as material to control exemption is established by the structural changes. The material facts in this connection will be briefly considered.

Exhibits "H," "I," and "J" of the defendant at trial are blueprints of original tracings showing; respectively, the floor plan of the duplex structure, the floor plan of the building after the alterations had been completed, and the floor space of the basement in the altered single unit (R. 74, 75, 88, 89, 91). Photographs numbered 1 to 8 inclusive were received in evidence as defendant's Exhibit "L" (R. 95, 96). The original exhibits referred to have been transmitted for examination by this Court. While the defendant testified at length (R. 88–101), respecting

such Exhibits and the nature of the alterations, the material facts in this connection may be in substance stated: In the duplex there were a total of three bedrooms, two in the north, or rear unit, and one in the front or southern unit (Exhibit "H"). In the single unit after the alterations two bedrooms were added, with an additional bedroom in the basement (Exhibit "H" and "I," R. 86). The partition or wall separating the duplex units was removed (R. 80, 90).

The northern, or rear unit of the duplex of the street number 415½ consisted of two bedrooms, a living room, breakfast nook, kitchen, bath, and screen porch (Exhibit "H"). In the alterations another bedroom was added by changing the living room of the former unit to such type of occupancy (R. 85, Exhibits "H" and "I"). The two bedrooms formerly existing in the duplex were "identical with the bedrooms" in the resulting single dwelling unit (R. 85). The bath as attached to such bedrooms remained in "exactly the same position" as it was as a duplex (R. 86). The space designated as a screen porch in this unit was changed to constitute a breakfast room in the single dwelling with some additional space added (R. 98, Exhibits "H" and "I").

The southern, or front duplex unit numbered 415, consisted of a bedroom, bath, kitchen with breakfast nook attached, and a living room and dinette (Exhibit "H," R. 88). In the altered single unit the living room space remained substantially unchanged except for the addition to the front end of the house of a reception room (R. 87, 90, Exhibits

application for an increase of rental or approval thereof. Subsequently, upon application of the defendant-landlord, the Rent Director entered an order increasing the allowable rent from $4.00 per week to $7.00 for occupancy by one or two persons, and $8.50 per week for occupancy by three or more persons. The Court held that under the interpretation of the Housing Expediter referred to (*supra,* p. 36), the altered accommodations were not subject to decontrol. In arriving at this determination the Court said (*infra,* p. 63):

> The question first and chiefly encountered is whether the alterations effected the decontrol of the accommodation, with the consequence of removing its amenability to regulation. That question has to be answered negatively. Before the improvements the accommodation was a single housing unit. Thereafter, though substantially enlarged and improved, it was still a single housing unit. It was much larger in floor space and number of rooms and superior in furnished facilities and equipment. Nevertheless it was residential space for only one social or family unit, though it could easily include more members than might comfortably have been sheltered in the sleeping room.

After referring to Section 202 (c) (3) of the Act and to the interpretation thereof by the Housing Expediter, the Court held that such "interpretation * * * is in harmony with the purpose of the Act," and should be given effect in holding the altered housing accommodations not subject to decontrol (*infra,* p. 65).

Other unreported decisions in which the foregoing official interpretation has been followed are *Woods* v. *Rettas* (D. C. N. D. N. Y.), No. 3173, decided March 25, 1949, and *Woods* v. *Anderson* (D. C. E. D. Mich.), No. 7977, decided June 20, 1949.[20] In the *Rettas* decision the defendants made substantial alterations by converting premises from a two-family to a three-family house, and modernized the second floor apartment by installation of new plumbing, fixtures, and cabinets. In such alteration a stairway leading from the second floor apartment was enlarged for access to an upper floor and a new apartment was created on the third floor. Following the official interpretation, the Court held that after such alterations the second floor apartment did not constitute "additional housing accommodations created by conversion," and were not removed from control under the provisions of the Act in Section 202 (c) (3).

Woods v. *Anderson, supra,* involved premises consisting of four unfurnished five room dwelling accommodations, each containing a living room, dining room, two bedrooms, kitchen, and bathroom, and each occupied by one family. After the four families had vacated, the defendant painted and redecorated the accommodations, placed a frigidaire and stove in each of the four kitchens, installed furnaces, hot water tank, gutters, a wiring system, and put locks on the doors. Some janitor service and some furnishings were also provided. The defendant then rented each of the five-room units to two families. One family occupied the

[20] Findings of fact and conclusions of law in these decisions appear in the Appendix (*infra*, pp. 69, 72).

living room and dining room of the unit, the other family occupied the two bedrooms, and both families shared the kitchen and bathroom. The Court held that the services and equipment furnished and the painting and decorating performed by the defendant did not constitute "a conversion." As the Court found, "On the contrary there resulted a restriction in the housing accommodations in that where formerly one family had the use of the kitchen and bathroom, after the change in rental plan, two families shared the kitchen and bathroom" (*infra,* p. 74). Upon the same basis where the duplex structure in the case at bar formerly afforded two separate dwelling units, the remaining single unit existing after the alteration manifestly did not constitute additional housing accommodations.

In *Woods* v. *MacNeil Bros. Co.* 80 F. Supp. 920 (D. C. Mass.), it was held that the mere providing of additional facilities to improve existing accommodations did not constiute new accommodations within the exemption provided in Secton 202 (c) (3) of the Act. So there was no basis for decontrol of the single dwelling unit here involved by reason of the installation of new plumbing, fixtures (R. 99–100), addition to the roof space (R. 95, 98), the construction of a new chimney (R. 95) and by improvement of the heating arrangements (R. 92).

Only one dwelling unit existing instead of the two former units of the duplex, defendant's application for decontrol and the Director's order rejecting decontrol (R. 115), related not to the two additional rooms resulting from the alterations but to the single remaining unit. It was such entire unit that the de-

fendant leased at a monthly rental admittedly in excess of the established legal maximum (R. 11, 14, 94, 110). It follows that it was manifest error for the Court below to hold that such single unit constituted "additional housing accommodations" (R. 108).

It can be readily understood how easily the intention of Congress to achieve effective rent control could be defeated if the exemption[21] provided by Section 202 (c) (3) of the Act were extended to landlords who merely made substantial alterations in living units but did not create additional housing accommodations. To accept that view would render wholly unnecessary the adjustment provisions available under the Act and Regulation when substantial alterations have been made. It would be an invitation to short-circuit the adjustment provisions and resort to making substantial alterations solely for the purpose of claiming the exemption provided by the Act where additional accommodations are created. This result must be rejected since it is clearly inconsistent with the language of the Act and the intent of Congress.

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[21] The rule of construction of exemptions from remedial legislation was more recently stated by the Supreme Court in *Phillips Company* v. *Walling*, 324 U. S. 490, 493, as follows:

"Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."

For application of this rule by this Court in its construction of various other statutes, see, *Canadian Pacific Ry. Company* v. *United States*, 73 F. 2d 831 (C. A. 9th); *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C. A. 9th); *McCauley* v. *Makah Indian Tribe*, 128 F. 2d 867 (C. A. 9th).

III

The Court below erred in failing to grant judgment in favor of plaintiff and to award restitution and injunctive relief as the complaint prayed

1. The trial Court should have ordered the defendant to restore to the tenant the excess rental admittedly collected

As the single dwelling unit did not constitute "additional housing accommodations" and remained subject to control under the Act and Regulation, the defendant violated Section 204 (b) of the Act (*infra,* p. 52), in charging and receiving from the tenant, Weiser, the monthly rental of $250.00 (R. 110). The defendant admitted (R. 11, 14), that the sum of $180.00 per month, as fixed by the Director's order of December 12, 1947 (R. 118) constituted the lawful maximum for the period from August 1, 1947, to December 31, of the same year. But for such period the defendant admittedly charged and received the following amounts (R. 15, 33, 111, 116):

Rent for August 1947, and in advance for the last five months of the lease, from March 1, 1949, to July 31, 1949, as recited in lease, 6 months at $250 per month	$1,500
Rent at the same figure for the months of September and October 1947	500
Total	$2,000

For the five month period from August 1, 1947, to December 12, 1947, as alleged in the complaint, the defendant was entitled to receive only the lawful maximum of $180 per month and totaling $900 for such period. There remained accordingly the overcharge of $1,100 which the trial Court permitted the defendant to retain by denial of the prayer for restitution (R. 108).

In *Woods* v. *Richman,* 174 F. 2d 614, this Court observed that restitution of rent overcharges was there sought, in part "under the provisions of Section 205 (a) of the 1942 Act and the substantially identical provisions of Section 206 (b) of the 1947 Act" (p. 615). And in considering the right to such relief under the same Act, the Court said (p. 616):

> We think, therefore, that it continues to be appropriate for the courts to consider whether an order of restitution should be made as a means of giving effect to the declared policy of Congress.

In *Gates* v. *Woods* (C. A. 4th), (*supra,* p. 23), two separate appeals were considered, in one of which the defendant-landlord appealed from an order of restitution and injunction restraining rent overcharges. In affirming such order the Court said (169 F. 2d, p. 443), "The power to order restitution of excess rentals seems clear," citing *Porter* v. *Warner Holding Co.,* 328 U. S. 395.

It is true that the award of such relief was discretionary with the trial Court, but the rent overcharges by the defendant were wilful and deliberate. Although advised both by the Rent Director (R. 109), and by the rent advisory board of her right to a rent adjustment (R. 121–122), the defendant made no effort to avail herself of this remedy and deliberately leased the accommodations at a rental charge $70 in excess of the admitted legal maximum (R. 15, 111). Under these facts restitution clearly should have been awarded. In *Woods* v. *Witzke,* No. 10797 (C. A. 6th) decided May 11, 1949, not yet reported, there was

considered the collection of rental overcharges based upon a finding "that the violation was wilful." As the Court said in reversing judgment which failed to award restitution, "That being so it would seem that the Court, in the exercise of a sound discretion, should have granted restitution to the full amount of the excess rent collected." It is submitted that such rule should have been applied by the trial Court here. cf. *Porter* v. *Crawford & Doherty Foundry Co.* (*supra,* p. 39), where this Court observed that failure of the defendants to apply for adjustment of prices on the commodity there involved, which was sold for amounts in excess of the lawful maximum, constituted a wilful violation of the applicable price regulation (154 F. 2d p. 435).

2. The Court below should have granted the injunctive relief which the complaint prayed

There being no basis for the lower Court's finding (R. 22, 108), that "additional housing accommodations were created" by alteration of the duplex unit, and defendant admitting, in effect (R. 15, 33), that the rent overcharges were wilfully collected, the Court below should have granted the injunction to restrain defendant from receiving further rents in violation of the Act and Rent Regulation (R. 3). While this Court in *Bowles* v. *Quon,* 154 F. 2d 72 (C. A. 9th), stated the rule that the "granting or refusing of an injunction was a matter resting within the discretion of the trial court," in the same decision the Court said (at p. 73): "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence * * *." (See, too, *Hecht* v. *Bowles,*

321 U. S. 321.) It follows that the trial Court clearly erred in denying the injunction (R. 23, 108), where under the Act, the Rent Regulation and the official interpretation of the Housing Expediter, the single dwelling unit was not eligible for decontrol.

CONCLUSION

Viewing either the defendant's failure to exhaust administrative remedies for review of the order rejecting decontrol of the single dwelling unit or the facts which clearly establish that such unit did not constitute "additional housing accommodations created by conversion" within the meaning of the Act and Regulation, there is no basis upon which the judgment appealed from can be supported. It is submitted, therefore, that the judgment be reversed with directions to the Court below to grant the relief of restitution and injunction as the complaint prayed.

Respectfully submitted.

ED DUPREE,
General Counsel,
HUGO V. PRUCHA,
Assistant General Counsel,
CECIL H. LICHLITER,
Special Litigation Attorney,
Office of the Housing Expediter, Washington 25, D. C.

APPENDIX A

Pertinent provisions of the Housing and Rent Act of 1947, as amended (50 U. S. C. App., Secs. 1881, et seq.):

SEC. 202. As used in this title—

(a) * * *

(b) The term "housing accommodations" means any building, structure or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, rooming- or boarding-house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

SEC. 202. As used in this title—

(c) The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include—

* * * * *

(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, * * *

SEC. 204. (b) During the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of

the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: * * *

204 (e) (1) The Housing Expediter is authorized and directed to create in each defense-rental area, or such portion thereof as he may designate, a local advisory board, each such board to consist of not less than five members who are representative citizens of the area, to be appointed by the Housing Expediter, from recommendations made by the respective Governors. Each such board shall have sufficient members to enable it promptly to consider individual adjustment cases coming before it on which the board shall make recommendations to the officials administering this title within its area. The local boards may make such recommendations to the Housing Expediter as they deem advisable with respect to the following matters:

(A) Decontrol of the defense-rental area or any portion thereof;

(B) The adequacy of the general rent level in the area; and

(C) Operations generally of the local rent office, with particular reference to hardship cases.

206 (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Pertinent provisions of the Controlled Housing Rent Regulation (12 F. R. 4331):

SEC. 1. (b) *Housing to which this regulation does not apply.* This regulation does not apply to the following: * * *

(8) *Accommodations first offered for rent.* (i) Housing accommodations, the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect; (ii) Housing accommodations which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant) as housing accommodations: *Provided, however,* That all housing accommodations referred to in this paragraph (8) shall be subject to this regulation unless the landlord files in the area rent office a report of decontrol on a form provided by the Expediter within 30 days after July 1, 1947, or within 30 days after the date of first renting, whichever is the later: and *Provided further,* That if a landlord fails to file said report of decontrol within the applicable specified period, such housing accommodations shall be and remain subject to the provisions of this regulation until the date on which he files said report.

For the purposes of this paragraph (8) the construction of housing accommodations is considered completed on the date the last material, fixture or equipment is incorporated into the structure provided the dwelling is suitable for occupancy at that time.

For the purposes of this paragraph (8) the word "conversion" means (1) a change in a structure from a nonhousing use or (2) a structural change in a residential unit or units involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations.

SEC. 4. *Maximum rents*—(a) *Maximum rents in effect on June 30, 1947.* The maximum rent for any housing accommodation under this regulation (unless and until changed by the Expediter as provided in section 5) shall be the maximum rent which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942, as amended, and the applicable rent regulation issued thereunder, except as otherwise provided in this section.

Pertinent provisions of Rent Procedural Regulation 1 (12 F. R. 5916):

REPORTS OF AND APPLICATIONS FOR DECONTROL

Introduction. Under section 202 (c) of the Housing and Rent Act of 1947, certain categories of dwelling accommodations are eligible for decontrol. To implement that section of the act and the applicable maximum rent regulations promulgated thereunder, §§ 840.17 through 840.22 provide for appropriate administrative proceedings on such decontrol.

§ 840.17 *Filing of reports of and applications for decontrol.* The appropriate maximum rent regulations contain provisions for the filing of reports of and applications for decontrol of certain categories of dwelling accommodations. The final determination by a rent director upon the filing of such report or application shall be made in the manner set forth below and shall be subject to administrative review as hereinafter provided.

§ 840.18 *Investigation.* Upon the filing of a report of or application for decontrol, the rent director may make such investigation of the facts, hold such conferences and require the filing of such evidence as he may deem necessary or appropriate in the circumstances.

§ 840.19 *Order rejecting report or application.* If the rent director determines that the report or application fails to conform with the provisions of section 202 (c) of the Housing and Rent Act of 1947 and the applicable regulations promulgated thereunder, he shall by order advise the landlord that the report or application has been rejected and that the accommodations concerned therein remain under control. Such order shall state the grounds for the rejection.

§ 840.20 *Landlord's objections; etc., upon order rejecting report or application.* Any landlord who has received an order provided for by § 840.19 may, within thirty (30) days after issuance of the order or the issuance of this part, whichever is later, either request reconsideration of such order, with opportunity to present objections and evidence in support of such objections, or file an application for review or appeal pursuant to § 840.23 or § 840.25 and following of this part. Upon any such reconsideration, the rent director shall either issue an order revoking the prior order rejecting the report or application or shall issue a notice terminating the proceeding upon reconsideration.

§ 840.21 *Proceedings on reports or applications initiated by rent director.* If upon filing of a report of or application for decontrol any element necessary to the determination of a maximum rent for the accommodations concerned therein is in dispute, in doubt, or is not known, the rent director may, at any time initiate a proceeding proposing the issuance of an order pursuant to § 840.22.

§ 840.22 *Order upon determination of proceedings on report or application.* If in a proceeding instituted under § 840.21 it is determined that the report or application should be rejected, the rent director shall issue an appropriate order determining that the accommodations remain subject to control and establishing the maximum rent.

Landlord's Application for Review of Rent Director's Action

§ 840.23 *Landlord's application for review.* (a) Any landlord, except a landlord subject to an order issued pursuant to § 840.8 (c), whose petition for adjustment or other relief has been dismissed or denied in whole or in part by the rent director, or any landlord subject to an order entered by the rent director on his own initiative, may file with the rent director an application for review of such determination by the Regional Rent Administrator for the region in which the defense-rental area office is located; *Provided,* That any landlord subject to an order entered under section 5 (d) of any maximum rent regulation or subject to an order entered by the rent director under §§ 840.7, 840.16 or 840.22 may either apply for review of such order as provided in this section, or may appeal any provision of such order as provided in § 840.25 and following of this part. An application for review shall be filed in triplicate upon forms prescribed by the Housing Expediter and pursuant to instructions stated on such forms. Upon the filing of an application for review of such determination, the rent director shall forward the record of the proceedings, with respect to which such application is filed, to the appropriate Regional Rent Administrator.

(b) Applications for review may be filed within sixty (60) days after the date of issuance of the determination to be reviewed or

within thirty (30) days after the date of issuance of this part, whichever is later. An application for review which is not filed within the specified time ordinarily will be dismissed unless special circumstances are shown to justify a later filing. * * *

§ 840.24 *Action on applications for review.* Upon the filing of an application for review in accordance with § 840.23, and after due consideration of the record, the Regional Rent Administrator shall determine whether the action of the rent director is appropriately substantiated by the record and is otherwise in accordance with applicable law and regulations. Upon the basis of such consideration, the Regional Rent Administrator may, by appropriate order, affirm, revoke, or modify, in whole or in part, the determination of the rent director sought to be reviewed or may remand the proceedings to the rent director for further action not inconsistent with the determination of the Regional Rent Administrator. In any case where an application for review does not conform in a substantial respect to the requirements of this part, the Regional Rent Administrator may dismiss such application. An order entered by a Regional Rent Administrator upon an application for review shall be effective and binding until changed by further order and shall be final subject only to appeal as provided in § 840.25 and following of this part. An order entered by a Regional Rent Administrator upon an application for review may be revoked or modified at any time, *Provided, however,* Due notice of the intention so to revoke or modify was previously given to the applicant. * * *

Subpart B—Appeals to the Housing Expediter

Introduction. Subpart B deals with "appeals" to the Housing Expediter. An appeal is the means provided for landlords to make

formal objections to a maximum rent regulation or order. The review by the Housing Expediter upon an appeal from an order of individual applicability will be limited to a determination of whether the action of the rent director is appropriately substantiated by the record and is otherwise in accordance with applicable law and regulations; and evidence not before the rent director will not be received from the person filing the appeal. However, upon consideration involving an appeal directed against a maximum rent regulation, the Housing Expediter will accord *de novo* consideration and will receive evidence and otherwise conduct the proceedings consistent with the provisions set forth below. The filing and determination of a proper appeal is ordinarily a prerequisite to obtaining judicial review of administrative determinations. At any time during the administrative consideration of an appeal directed solely to a regulation, the Administrator may refer the appeal to the rent director for the area from which the appeal arises and request such rent director to make recommendation with respect to the disposition of the appeal.

General Provisions

§ 840.25 *Right to appeal.* (a) Any landlord subject to any provision of a maximum rent regulation, or of an order issued under § 840.24 (except an order remanding to the rent director), or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by the rent director under §§ 840.7, 840.8 (c), 840.16 or 840.22, may file an appeal in the manner set forth below.

(b) A landlord is subject to a provision of a maximum rent regulation or of an order only if such provision prohibits or requires action by him.

(c) Any appeal filed by a landlord not subject to the provision appealed from, or otherwise not in accordance with the requirements of this part, may be dismissed by the Housing Expediter.

§ 840.26 *Time and place of filing appeals.* (a) Any appeal against the provisions of a maximum rent regulation may be filed at any time after the issuance thereof.

(b) Ordinarily there will be no reason why an appeal from an order affecting only an individual and issued under § 840.24, or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by a rent director under §§ 840.7, 840.8 (c), 840.16, or 840.22, cannot be filed promptly after the issuance of such order. Accordingly, if an appeal is not filed within sixty (60) days after the date of issuance of such order or within thirty (30) days after the issuance of this part, whichever is later, the Housing Expediter ordinarily will regard the delay as unreasonable and will dismiss the appeal unless special circumstances are shown to justify the delay.

(c) Appeals shall be filed with the Certifying Officer, Office of the Housing Expediter (formerly known as the Secretary, Office of Rent Control), Washington 25, D. C. A copy of the appeal shall also be filed with the appropriate Regional Rent Administrator or rent director as provided in § 840.28: *Provided, however,* That an appeal directed solely against a regulation shall be filed with the rent director of the area out of which the appeal arises and the rent director shall, within twenty (20) days of such filing transmit the appeal to the Housing Expediter. The rent director may also transmit such pertinent data and materials as are available. * * *

APPENDIX B

In the United States District Court for the District of Nebraska, Lincoln Division

No. 61–48 Civil

Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, for and in behalf of the United States, plaintiff

v.

Robert Fees and Mrs. Robert Fees, defendants

MEMORANDUM

Delehant, D. J.: The plaintiff, in behalf of the United States, brings this action against the defendants under Section 206 (b) of the Housing and Rent Act of 1947, as amended (Title 50 App. U. S. C. A. Section 1881 et seq.), and in his complaint prays for an injunctive order against the violation by the defendants, as the owners of a designated housing accommodation in the city of Lincoln, Nebraska, of the Act or of the Controlled Housing Rent Regulation thereunder. The complaint is based on the defendants' alleged receipt of overceiling rentals from one Don Rieger, tenant of the accommodation, for the period from May 26, 1948, to September 10, 1948.

Answering, the defendants admit their status as landlords of the accommodation and Rieger's tenancy, and allege, (a) the making of major alterations after their initial registration of the accommodation under then current rent regulations, which, upon the trial they contended, effected its decontrol under the Housing and Rent Act of 1947, (b) their own good faith,

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(c) the full understanding and concurrence of Rieger in the rental arrangement for the applicable period, and (d) the essential justice and fairness in the circumstances of the rental paid.

The action has been tried to the court without a jury; and in the trial, the issue principally drawn to the court's attention was whether the housing accommodation in question was decontrolled during the time set out in the complaint. The essential facts are not seriously in dispute. They will now be set out very briefly and without unnecessary detail.

The accommodation in question is located in the basement of the defendants' residence property. at 315 North 18th Street, Lincoln, Nebraska. On May 6, 1947, Mrs. Fees filed with the local Area Rent Office of the Office of Price Administration a registration of it as a basement sleeping room with shared bath room and toilet facilities (located not in the basement but on the first or main floor) and shared telephone service and laundry space, for which a rental rate of $4.00 per week was then being charged, and was allowed and fixed by the rent office. The room which was eight feet by eleven feet in size was occupied at the time of its registration by two ladies who thereafter vacated it.

The defendants then and after February 1, 1947, and after the passage and approval of the Housing and Rent Act of 1947, and immediately before its leasing to Rieger, substantially rebuilt and enlarged the accommodation. Without itemizing all of the changes, it may be said that it was converted into an apartment with two bed rooms, a kitchen, a toilet, and a shower bath, all enclosed for private occupancy; whereas, before the alterations, only the single sleeping room was segregated for private occupancy and that by curtain only, and the laundry space was in

another part of the basement. Besides, the defendants furnished the new apartment and it was rented as a furnished apartment. The cost of the changes was somewhere between $300.00 and $500.00.

When the remodeling was almost completed the defendants rented the altered accommodation to Don Rieger for $40.00 per month; and Rieger, his wife, and a male roomer, occupied the apartment from May 26, 1948, to September 10, 1948, and over that period Don Rieger paid rent for it at the rate of $40.00 per month.

During that tenancy the defendants neither obtained an approval of an increase in the rental for the altered accommodation nor made any application therefor. However, on October 21, 1948, Mrs. Fees filed with the Lincoln Rental Area Office of the Office of Housing Expediter a landlord's petition for the adjustment of rent for the accommodation, designating $40.00 as the then current monthly rent for it, fully furnished; and after inspection, the Lincoln Area Rent Director, on October 21, 1948, increased the allowable rent from $4.00 per week to $7.00 per week for occupancy by one or two persons, and $8.50 per week for occupancy by three or more persons.

The question first and chiefly encountered is whether the alterations effected the decontrol of the accommodation, with the consequence of removing its amenability to regulation. That question has to be answered negatively. Before the improvements the accommodation was a single housing unit. Thereafter, though substantially enlarged and improved, it was still a single housing unit. It was much larger in floor space and number of rooms and superior in furnished facilities and equipment. Nevertheless it was residential space for only one social or family unit, though it could easily include more members

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than might comfortably have been sheltered in the sleeping room.

> By section 202 (c) of the Act it is provided, inter alia, that, "The term 'Controlled Housing Accommodations' means housing accommodations in any defense-rental area, *except that it does not include:*
>
> * * * * *
>
> (3) *any housing accommodations* * * * *which are additional accommodations created by conversion on or after February 1, 1947.*" [Italics added].

This language has undergone formal interpretation by the Authority charged with the enforcement of the Act (see 13 F. R. 5001 et seq.) in the following language:

> In determining whether additional housing accommodations have been created, the primary test is not whether there are more tenants in occupancy than before the conversion, nor whether there is more floor space. The determination is made by comparing the number of dwelling units before and after the conversion.

The court recognizes that an administrator's interpretation of a legislative act with whose enforcement he is charged is entitled to less weight than his interpretation of the meaning of one of his own regulations, which has authoritatively been held to the "ultimate criterion" of such meaning, *Bowles* v. *Seminole Rock Co.,* 325 U. S. 410. But, by the great weight pertinent authority, the cited administrative interpretation, though not controlling upon the court, is entitled to substantial regard in the judicial consideration of specific cases to which it has application, and unless it is plainly erroneous or inconsistent with the Act it constitutes a service to which the

court may have resort in appraising the meaning of the Act. *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178; *Skidmore* v. *Swift & Co.,* 323 U. S. 134; *Bridgeman* v. *Ford Bacon & Davis* (D. C. Ark), 63 F. Supp. 733; *Abram* v. *San Joaquin Cotton Oil Co.* (D. C. Cal.), 46 F. Supp. 969. And no such error or inconsistency is perceived in the quoted appraisal of the applicable section of the Act. On the contrary, the interpretation of the Expediter is in harmony with the purpose of the Act, high among which is the substantial increase in the number of available housing units, *Woods* v. *MacNeil Bros. Co.,* (D. C. Mass), 80 F. Supp. 920.

To the well grounded suggestion that the rental value of the accommodation has been greatly enlarged at substantial cost to the defendants, it is sufficient to observe that Section 5 (a) (1) and (3) of the Housing and Rent Regulation under the Act, has made adequate provision for the granting of increases in rentals under such conditions. And resort has actually been had to it by the defendants.

That brings the court to a second reflection. The defendants by seeking and obtaining, though somewhat tardily and in slightly smaller measure than they desired, an adjustment upward of their rental have themselves cast doubt upon the validity of their contention that the space is freed from control. Undoubtedly, the court should not appraise a mistaken resort to the facilities for increase in the allowable rentals for controlled housing accommodations, as a waiver of a well grounded contention for decontrol. But there is no mistake here; merely a recognition, however reluctant, of the accommodation's controlled status.

The other considerations urged by the defendants, including their good faith in the premises, the ready

and unreserved concurrence by Rieger in the rental arrangement, and the objective fairness of the amount of the rental for the remodeled accommodation, if the effective maximum rental order in respect of it be disregarded are factually true. But in considering whether an injunction against future violation should be granted they are inoperative to nullify or excuse the violation of the act and regulation. *The Hecht Co.* v. *Bowles,* 321 U. S. 321; *Henderson* v. *Baldwin* (D. C. Pa.), 54 F. Supp. 438; *Brown* v. *W. R. McNeil, Inc.* (D. C. Wis.), 52 F. Supp. 485. Control in the pricing field, including housing rentals, would be completely paralyzed, if even in good faith but in disregard of the administratively determined price the receiver and the payer could agree without restraint upon a different consideration, however equitable it might individually be.

The violation alleged in the collection of rent from Rieger, thus, stands proved. To the suggestion that an injunctive order should not be made, because the defendants have now obtained and presumably will observe a new maximum price order, it has to be answered that the position of the defendants in this case forbids such a conclusion. Despite their fruitful resort to the Area Rent Office, they still contend that the accommodation is decontrolled, and, therefore, beyond the jurisdiction of that office, and, for that matter, of the Expediter and the court. The injunction should, therefore, be granted.

However, the plaintiff also demands that the order require the defendants to return to Rieger the amount by which the rentals he paid exceed the rental for the period of his occupancy at the prescribed maximum rate of $4.00 per week. That the court, in the exercise of its discretion as a court of equity, refuses

to do; in furtherance of which refusal the prayer of the complaint is denied to that extent.

In the latter course, the court fully recognizes the rule declared in *Porter* v. *Warner Holding Co.,* 328 U. S. 395, and the many subsequent cases which followed it. No doubt exists that this court has the power to make an order for restitution. But, whether such an order "be considered as an equitable adjunct to an injunction decree" or "an order appropriate and necessary to enforce compliance with the Act," (see 328 U. S. at pp. 399 and 400), it should spring in any event from equitable considerations.

And in the factual framework of this particular case, an order, ostensibly requiring restitution, would confer on Rieger a manifest windfall and constitute a perversion, rather than a legitimate exercise, of the court's power to compel the doing of equity. It is one thing to recognize, in the course of administering the Housing and Rent Act of 1947 that, claiming decontrol, the defendants, in failing to seek a timely increase in rental for their vastly enlarged, altered and improved housing accommodation, and in collecting, meanwhile, a rent beyond the earlier determined maximum prescription, violated the Act and its regulation and subjected themselves to liability for an injunctive order against further violation. It is quite another thing to compel them to repay approximately sixty percent of the rental they received to the man who enjoyed for himself, his wife and a roomer the hospitality of that housing facility and paid for it only a fair and reasonable sum per month which he was perfectly willing to pay. The court is fortified in its view of the reasonableness of the rent charged by the circumstances that the local rent control office eventually fixed $8.50 per week as the allowed rental for the occupancy of the premises by three persons. That means about $36.50 or $37.50 per month. And Rieger

paid $40.00 per month. What he paid was not disproportionate to, but rather eminently fair for, what he received. It would be sheer oppression of the defendants to compel them to return its larger part. And Rieger might well point in exultant derision to a court which would stultify itself by awarding such an underserved gratuity—and that under the guise of equity.

What has clearly to be kept in view is, that from the standpoint of the general enforcement of the Act by injunction, the housing accommodation involved is still controlled and the court must determine its maximum rentals from time to time according to the area rent director's operative orders; but that as between the defendants and Rieger the housing unit he occupied was only technically, not realistically, the unit for which the director at one time prescribed a $4.00 weekly rental. And the latter reflection enters vitally into the equity of the restitution order for which the plaintiff inequitably prays.

Dated: June 2, 1949.

Filed District of Nebraska at 4:00 p. m., #15, June 2, 1949.

MARY A. MULLEN,
Clerk.

By EBP, *Deputy.*

A true copy.
Attest: [SEAL] MARY A. MULLEN,
Clerk.

By (S) E. P. PANTER,
Deputy.

United States District Court for the Northern District of New York

Civil Action, File No. 3173

Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, plaintiff

v.

Stella Rettas and George Rettas, defendants

Findings of Fact and Conclusions of Law

This action having duly come on for trial before this Court without a jury on February 24, 1949, plaintiff having appeared by Sylvan D. Freeman, J. S. Brounstein, of counsel; and defendant having appeared by Spira & Hershkowitz, Max H. Hershkowitz, of counsel, and after hearing testimony of witnesses and argument of counsel, and upon all the pleadings and proceedings in the cause and full consideration thereof, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff is the duly appointed Housing Expediter, Office of the Housing Expediter.

2. Defendants, George and Stella Rettas, at all times pertinent hereto were landlords and operators of housing accommodations located at premises 1122 24 Sixth Avenue, Schenectady, New York.

3. That the 2nd floor apartment at said premises, was at all times pertinent hereto, subject to the Housing & Rent Act of 1947, as amended and the Controlled Housing Regulation issued thereunder.

4. Prior to March 18, 1948, the maximum legal rent for the 2nd floor apartment was $25.00 per month, as indicated in a registration statement filed in the Area Rent Office.

5. In about November 1947, defendants converted the premises from a 2 family to a 3 family house, completely modernized the 2nd floor apartment by the installation of new plumbing, fixtures, and cabinets. In the course of such alteration, a stairway leading to the 3rd floor attic was enlarged for access thereto and a new apartment was created on the 3rd floor.

6. Defendants' application to the Office of the Housing Expediter for an increase in the maximum legal rent of the 2nd floor apartment resulted in an order permitting an increase to $70.00, including heating fuel, per month, effective March 18, 1948.

7. Stephen Jason was a tenant occupying the 2nd floor apartment from December 7, 1947, to March 15, 1948, and paid the defendants the sum of $25.00 per week during that period except that no rent was paid for the last 3 weeks thereof.

8. Tenant Roy E. Burris, Jr., occupied the 2nd floor apartment from April 1, 1948, to November 30, 1948, and paid the defendants $80.00 per month for that period plus a total of $57.88 for fuel oil.

9. Section 202 (c) (3) of the Housing & Rent Act of 1947 and Section 1 (b) (2) of the Regulation provide that additional housing accommodations created by conversion on or after February 1, 1947, may be decontrolled.

10. An official interpretation of these sections issued by Ed Dupree, General Counsel of the Office of the Housing Expediter on August 25, 1948, and published in the Federal Register holds that the decontrol determination is made with respect to the dwelling units

which are necessarily involved in the creation of additional housing accommodations.

11. The 2nd floor apartment is not "additional housing accommodations created by conversion" as contemplated by the Act and Regulation thereunder.

12. Since the two tenants involved had the benefit of the modernization, on which the March 18, 1948, order of the Area Rent Director, increasing the maximum legal rent to $70.00, was based, equity requires that that rental be used as the basis for computing overcharges.

13. The tenant Stephen Jason has been overcharged the sum of $18.66.

14. The tenant Roy E. Burris has been overcharged the sum of $137.88.

15. The defendants have charged rentals in excess of the legal maximum rent and because of this claim that the 2nd floor apartment is decontrolled, will continue to so overcharge unless restrained.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter of this action.

2. The 2nd floor apartment of the premises is not removed from rent control by the provisions of Section 202 (c) (3) of the Housing and Rent Act of 1947 as amended.

3. Plaintiff is entitled to an order requiring defendant to refund $18.66 to Stephen Jason and $137.88 to Roy E. Burris.

4. Plaintiff is entitled to a permanent injunction against the defendants as prayed for in the complaint.

Dated: Utica, New York, March 25, 1949.

(S) STEPHEN W. BRENNEN,
U. S. D. J.

In the District Court of the United Sates for the Eastern District of Michigan, Southern Division

Civil Action No. 7977

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, PLAINTIFF

v.

HARRY L. ANDERSON, 3967 ST. CLAIR STREET, DETROIT, MICHIGAN, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

This cause came on for hearing on the Complaint filed by the plaintiff, Answer of defendant and other pleadings, statements of counsel and evidence submitted to the Court. Upon consideration thereof the Court finds specially that:

1. Plaintiff filed the above action as Housing Expediter under the provisions of the Housing and Rent Act of 1947, as amended, seeking restitution to the tenants, or in the alternative to the United States, and a final injunction, restraining violation of the Housing and Rent Act of 1947, as amended, by the defendant.

2. The defendant, Harry L. Anderson, is the owner, landlord, and operator of the housing accommodations located at 2524–26 Pennsylvania, Detroit, Michigan, within the Detroit Defense-Rental Area.

3. Counsel for defendant stipulated in open Court that providing the housing accommodations involved herein are subject to control, the rental units, the

names of the tenants, the periods of occupancy, the maximum legal rents, and the rents received by the defendant, all as set forth in Schedule "A" attached to plaintiff's Complaint are correct.

4. The sole issue raised by the defendant in this case was that under Section 202 (c) (3) of the Housing and Rent Act of 1947, as amended, the defendant had created additional housing accommodations by conversion after February 1, 1947, and the housing accommodations involved herein were decontrolled.

5. The Controlled Housing Rent Regulation defines conversion as "(2) a structural change in a residential unit. * * * involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations."

6. In Interpretation 2 of Section 1 (b) 2, issued August 25, 1948, paragraph v–4 applies the requirement that for decontrol in this respect there must be a structural change involving substantial alterations or remodeling. Section 5 requires that where there has been a structural change involving substantial alterations or remodeling, decontrol occurs only if additional housing accommodations result from this work. Section 6 requires that in determining whether additional housing accommodations have been created, the primary test is not whether there are more tenants in occupancy than before the conversion. The determination is made by comparing the number of dwelling units before and after the conversion.

7. On November 25, 1947, the defendant purchased the premises consisting of four unfurnished five-room dwelling accommodations, each containing a living room, dining room, two bedrooms, kitchen, and bathroom, and each occupied by one family.

8. These four families vacated the premises on and after December 18, 1947, and the defendant then painted and decorated the premises, placed a Frigidaire and stove in each of the four kitchens, installed furnaces, hot water tanks, gutters, a wiring system, and put locks on the doors. Some janitor service and some furnishings were provided.

9. The defendant then rented each of the identical five-room units to two families, one family occupying the living room and dining room and the other family occupying the two bedrooms, both families sharing the kitchen and bathroom.

10. No structural changes were made and no additional housing accommodations were created. The services and equipment furnished and the painting and decorating performed by the defendant do not constitute a conversion. On the contrary there resulted a restriction in the housing accommodations in that where formerly one family had the use of the kitchen and bathroom, after the change in rental plan, two families shared the kitchen and bathroom.

11. The claim of overcharges as to tenant, Joseph Johnson, was withdrawn from consideration in this case, on the ground that this tenant filed an independent action against the defendant herein to recover such overcharges.

12. From January 30, 1948, to October 7, 1948, said defendant demanded and received from Clyde Haines, rents in excess of the maximum legal rents for the use and occupancy of the upper south front rooms of said housing accommodations in the sum of $378.00.

13. From March 1, 1948, to September 11, 1948, said defendant demanded and received from S. K. Haines for the use and occupancy of the upper north front rooms of said housing accommodations, rents

in excess of the maximum legal rent in the sum of $286.00.

14. From September 11, 1948, to December 11, 1948, said defendant demanded and received from Barbara Means for the use and occupancy of the upper north front rooms of said housing accommodations, rents in excess of the maximum legal rent in the sum of $123.50.

15. From December 18, 1948, to February 5, 1949, said defendant demanded and received from James Haguely for the use and occupancy of the upper north front rooms, and from March 27, 1948, to December 18, 1948, for the use and occupancy of the upper north rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of $368.50.

16. From January 6, 1948, to February 3, 1949, said defendant demanded and received from W. Hawkins for the use and occupancy of the lower north front rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of $560.00.

17. From January 7, 1948, to February 3, 1949, said defendant demanded and received from C. Arnold for the use and occupancy of the lower north rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of $465.00.

18. From January 1, 1948, to February 3, 1949, said defendant demanded and received from Theo. Wimberly for the use and occupancy of the lower south front rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of $475.00.

19. From January 1, 1948, to February 5, 1949, said defendant demanded and received from Alma